Congress of the United States

Washington, DC 20510

September 5, 2003

The Honorable Michael K. Powell
Chairman of the Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell:

We are aware that the Commission is considering proposals to regulate content protection through "broadcast flag" rules and the "Subpart W" rules proposed in the "cable plug-and-play" rulemaking. Collectively, these proposed rules would regulate the protections that content owners can obtain for content transmitted over any digital television system – be it broadcast, cable, or satellite.

As you know, the rights that content owners can assert against third parties are defined by Congress in the Copyright Act, and Congress has not delegated its constitutionally derived copyright powers to any administrative agency. We understand that the Commission has proposed to regulate content protection only to address perceived exigencies associated with the transition from analog to digital television transmission. This digital-television transition is a unique historic event that raises important public policy considerations as well as presenting significant regulatory and technical challenges.

Should the Commission conclude that the special circumstances of digital-television transition require it to consider content-protection rules, we will carefully review its reasoning, rules and legal authority.

We are concerned that the so-called "Subpart W" rules proposed in the cable plug-and-play rulemaking reflect an approach to content protection that appears incompatible with the principles of the Copyright Act. Apparently, those proposed rules resulted from negotiations between content distributors from which content creators were unaccountably excluded. Those rules could also foreclose existing market mechanisms that creators now use to protect their content: Indeed, cable-television interests have stated that those rules are intended to keep competing satellite-television systems from using superior content protection to compete for premium content. We would not want to see final rules adopting regulatory approaches that exceed the scope of the Commission's jurisdiction.

We recognize that the Commission needs to avoid any unnecessary delay in promulgating viable rules to facilitate the transition to digital television. Nevertheless, we have outlined below some specific concerns that the proposed rules pose.

- **Content-protection rules should not limit any of the rights that holders of copyrights may assert under the Copyright Act**: To avoid intrusion into the core of copyright law, the Commission should make certain that its rules do not alter fair-use analysis or establish "statutory licenses" that foreclose legal claims by content owners.

- **Content-protection rules should not be promulgated in stages**: Acting on both sets of proposed content-protection rules simultaneously would help the Commission ensure that manufactured devices provide all necessary protections. For example, were plug-and-play rules promulgated before broadcast-flag rules, cable-ready digital televisions manufactured in the

interim could ignore the broadcast flag. Simultaneous promulgation of any broadcast-flag and cable-plug-and-play rules would also let the affected parties remedy those defects in the proposed Subpart W rules described below.

- **Content-protection rules should honor the principles of the Copyright Act**: The Copyright Act balances the interests of content creators, users and distributors through a complex array of rights, limitations, and statutory licenses - some designed specifically for cable and satellite television. The Commission should avoid claims that its general "public interest" mandate authorizes rules that ignore or readjust the balance between creators, distributors and users that Congress struck in the Copyright Act. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (holding that "common sense" precluded a similar interpretation of agency authority). The proposed Subpart W rules appear to conflict with the Act in at least the following respects.

    - **Content-protection rules should not be devised in negotiations that exclude the affected content owners**: The proposed Subpart W rules apparently derive from negotiations between two groups of content distributors: cable-system operators and consumer-electronics manufacturers. Content creators are indispensable parties to any negotiations over content-protection standards or rules, and they should be included in such negotiations.

    - **Content-protection rules should not expand fair use analysis**: The most objectionable of the proposed Subpart W rules would authorize the Commission to consider an array of factors when approving content-protection rules for new business models and new services within existing business models. This proposal appears to both ignore and expand the fair-use balancing analysis prescribed by Congress in the Copyright Act.

We appreciate your attention to these matters as you go about your difficult and important work in this area. We look forward to working together to achieve the best result for consumers while upholding the balance of rights that have, for many years, incentivized a flowering creativity in America.

Sincerely,

Patrick Leahy
Ranking Democratic Member
Senate Committee on the Judiciary

Orrin G. Hatch
Chairman
Senate Committee on the Judiciary

John Conyers, Jr.
Ranking Democratic Member
House Committee on the Judiciary

Lamar Smith
Chairman
House Subcommittee on Courts,
the Internet, and Intellectual Property